No. 86-2060

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM REY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court erred by giving a modified *Allen* charge to the jury.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A42) is reported at 811 F.2d 1453.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1987. A petition for rehearing was denied on April 29, 1987. The petition for a writ of certiorari was filed on June 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and use of a telephone to facilitate a

cocaine conspiracy, in violation of 21 U.S.C. 843(b). He was sentenced to concurrent terms of six years' imprisonment on the conspiracy and possession counts and four years' imprisonment on the facilitation count. The terms of imprisonment were to be followed by a three-year special parole term. The court of appeals affirmed (Pet. 6-7; Pet. App. A1-A42).

1. The evidence at trial showed that in May 1984 the DEA began investigating petitioner for cocaine trafficking. The investigation began after a DEA informant implicated petitioner in a cocaine smuggling venture. The informant recorded several telephone calls in which petitioner referred to cocaine. On August 24, 1984, a DEA undercover agent posing as a cocaine buyer met with petitioner in Fort Lauderdale, Florida. Petitioner explained that he had access to ten kilograms of cocaine and that his source was in Miami. The agent showed petitioner $400,000 in cash at that time. Three days later, petitioner advised the agent and the informant that he had eight kilograms of cocaine for sale and that a sample of the drug was located at a nearby perfume factory. The three men went to the perfume factory where petitioner introduced the agent and the informant to his "source," who showed them a package that allegedly contained cocaine. The agent and the informant then left the factory, purportedly to obtain money for the sale. Shortly afterwards, DEA agents arrested petitioner and seized two kilograms of 87 percent pure cocaine. Pet. 7-17.

2. The trial lasted two days. The jury deliberated for five and one-half hours on Friday, November 22, 1985, and resumed its deliberations at 9:30 a.m. on Tuesday, November 26, 1985. At noon on Tuesday, the jury informed the court that it could not reach a unanimous decision. Pet. 25-27; Pet. App. A18. Over objection from defense counsel, the court gave the jury a modified version of the so-called "*Allen* charge" (see *Allen* v. *United States*,

164 U.S. 492 (1896)). The court instructed the jury as follows (Pet. App. A31-A34):

> I'm going to ask you to continue your deliberations in an effort to reach an agreement upon a verdict and dispose of this case.
>
> Now I have a few additional comments at this time that I would like for you to consider as you do so: This is an important case. The trial has been expensive in time, effort, money and emotional strain to both the defense and the prosecution.
>
> Now if you should fail to agree upon the verdict, the case will be left open and may have to be tried again.
>
> Obviously, another trial would only serve to increase the costs to both sides. And there's no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.
>
> Any further jury must be selected in the same manner and from the same source as you were chosen, and there's no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial or more competent to decide it or that more or clearer evidence could be produced.
>
> Now, if a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression upon the minds of the others.
>
> On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt.

> Remember at all times, no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence. But after full deliberation and consideration of the evidence in the case, it's your duty to agree upon a verdict if you can do so.
>
> You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty.
>
> You may be leisurely in your deliberations as the occasion may require and should take all the time which you may feel is necessary.
>
> I'm going to ask you to retire once again and continue your deliberations with these additional comments in mind, to be applied of course in conjunction with all of the other instructions I have previously given to you.

The jury resumed its deliberations at 12:10 p.m. Shortly afterwards, the jury foreperson resigned with the court's permission and a new foreperson was selected. At 1:45 p.m., the jury returned a verdict of guilty on all three counts. Pet. 27-29; Pet. App. A18-A19.

3. The court of appeals affirmed (Pet. App. A1-A42). The court held that the district court did not err by giving the *Allen* charge to the jury, because prior circuit precedent had approved of the use of the charge "under circumstances that suggest more coercion than in the present case" (*id.* at A29-A30). The court also rejected petitioner's argument that the resignation of the foreperson following the *Allen* charge showed that in this case, the instruction had been particularly coercive. The court reasoned that every time an *Allen* charge results in a verdict, it means that at least one juror has changed his mind; the charge "is no more coercive because that juror may happen to be the foreperson" (*id.* at A30-A31).

The court stated that if the issue were one of first impression, it would hold the *Allen* charge given in this case to be impermissible. The court acknowledged that the charge given in this case was "virtually identical" to the pattern *Allen* instruction for the Eleventh Circuit, and that it "lacked some of the most offensive provisions of other Allen-type charges" (Pet. App. A22). Nonetheless, the panel stated that in its view the district court's charge "still tended to coerce the jury into reaching a verdict" (*ibid.*). The court concluded, however, that it was bound by prior circuit precedent upholding an *Allen* charge similar to the one given in this case, and it therefore affirmed petitioner's convictions (*id.* at A29-A30).[1]

ARGUMENT

Petitioner contends (Pet. 39-61) that the district court erred by giving a modified form of the *Allen* charge to the jury. We submit that the instruction in this case was balanced and did not contain the kind of coercive language that could prejudice a defendant's right to a unanimous verdict from a unbiased jury.

In *Allen* v. *United States,* 164 U.S. 492, 501-502 (1896), this Court held that it was proper for a district court to give a supplemental instruction to a deadlocked jury encouraging the jurors to be open-minded and to reconsider their views if possible during their deliberations so that a definitive verdict might be reached.[2] In recent years,

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[1] Petitioner sought en banc review of the panel decision, but his petition was denied without attracting a single vote (Pet. App. A43-A45). The panel also held that the government did not violate petitioner's rights under the Due Process Clause by its use of an informant in this case (Pet. App. A16-A18). Petitioner does not challenge that ruling in this Court.

[2] Since the decision in *Allen,* this Court has several times affirmed convictions that were challenged on the ground that the verdict was coerced by an *Allen* charge. See *Lias* v. *United States,* 284 U.S. 584,

instructions patterned on the charge in *Allen* have been rejected by some courts. The primary criticism of the *Allen* charge is that it instructs jurors in the minority to reexamine their views, but it does not contain a similar instruction to the jurors who are in the majority. See, *e.g.*, *United States* v. *Flannery*, 451 F.2d 880, 883 (1st Cir. 1971) ("[w]henever a court instructs jurors to reexamine their positions, it should expressly address its remarks to the majority as well as to the minority"); *United States* v. *Thomas*, 449 F.2d 1177, 1183 (D.C. Cir. 1971) (noting the coercive nature of "statements susceptible to an interpretation reflecting unwholesomely upon minority jurors simply because they happen to be in the minority"); *United States* v. *Sawyers*, 423 F.2d 1335, 1342 (4th Cir. 1970) (noting that the *Allen* charge would be "better balanced, and fairer, if mention [were] made of the duty of the majority to listen and consider any minority viewpoint, for * * * being in the majority does not necessarily make one right"); *United States* v. *Fioravanti*, 412 F.2d 407, 417 (3d Cir.), cert. denied, 396 U.S. 837 (1969) (indicating that the "very real treachery of the Allen Charge" is that "[i]t contains no admonition that the majority reexamine its position; it cautions only the minority to see the error of its

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aff'g 51 F.2d 215, 218 (4th Cir. 1931); *Kawakita* v. *United States*, 343 U.S. 717, 744 (1952), aff'g 190 F.2d 506, 521-528 (9th Cir. 1951). In *Lias*, the court of appeals had upheld a supplemental charge "substantially" similar to the *Allen* charge (51 F.2d at 218). This Court, on writ of certiorari "limited to the question raised by the supplemental charge to the jury" (284 U.S. 604 (1931)), affirmed the lower court's judgment per curiam, simply citing the *Allen* decision. In *Kawakita*, the court of appeals had upheld a supplemental charge substantially like the *Allen* instruction (190 F.2d at 521-528). Although the use of the instruction was one of the alleged errors relied on for reversal (see Pet. Br. at 160-169, *Kawakita* v. *United States*, No. 570 (1951 Term), this Court disposed of the contention by grouping it with others and saying that all were "either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice" (343 U.S. at 744).

ways"); *Fields* v. *State*, 487 P.2d 831, 836 (Alaska 1971) (same); *State* v. *Thomas*, 86 Ariz. 161, 162-166 342 P.2d 197, 198-201 (1959).

The charge in this case suggested that if a substantial majority of the jurors favored conviction, the minority jurors should reconsider their views. But the charge also stated that even if only a minority of the jurors favored acquittal, the others should reconsider whether they "should accept the weight and sufficiency of the evidence which fails to convince [the other] jurors beyond a reasonable doubt" (Pet. App. A33). Thus, the charge did not contain the much criticized language that only the minority jurors should reexamine their views.[3]

The charge in this case also did not suffer from a defect commonly attributed to other variations of the *Allen* charge, which have been criticized for placing undue emphasis on the prospect of a retrial and the costs that a retrial would impose on both parties. See *United States* v. *Silvern*, 484 F.2d 879, 880-881 (7th Cir. 1983) (en banc); *United States* v. *Thomas*, 449 F.2d at 1183. In this case, the instruction stated only that if the jury did not reach a decision, the case would be left open and *might* have to be tried again; the instruction thus told the jury that a retrial was possible, but not inevitable. See *United States* v. *Harris*, 391 F.2d 348, 354-357 (6th Cir. 1968). In addition, although the instruction in this case referred to the expenses of the trial and to the costs of a retrial, it did not dwell on those features. Compare *United States* v. *Angiulo*, 485 F.2d 37, 39 (1st Cir. 1973) (charge made extensive references to expenses of trial); *Peterson* v. *United States*, 213 F. 920, 924-926 (9th Cir. 1914) (references to

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[3] For that reason, there is no merit to petitioner's contentions (Pet. 45, 50-51) that the charge was "conviction prone" or that it did not urge the jurors who favored conviction to reexamine their views.

trial expenses were not balanced). See also *United States* v. *Mason*, 658 F.2d 1263, 1267 (9th Cir. 1981) (overemphasis on fiscal concerns can constitute abuse).

In addition to these features, the instruction given in this case carefully balanced the references to the consequences of a deadlocked jury by stating that the jurors should not feel compelled to surrender their honest convictions merely to reach a verdict. See *United States* v. *Scott*, 547 F.2d 334, 337 (6th Cir. 1977); *Berger* v. *United States*, 62 F.2d 438, 440 (10th Cir. 1932).[4] In addition, the instruction reminded the jury that it should return a verdict of not guilty if the evidence failed to establish petitioner's guilt beyond a reasonable doubt. In sum, the instruction, viewed as a whole, was not impermissibly coercive. See *United States* v. *Nichols*, 820 F.2d 508, 511-512 (1st Cir. 1987); *United States* v. *Kelly*, 783 F.2d 575, 576-577 (5th Cir. 1986), cert. denied, No. 86-5429 (Oct. 14, 1986); *United States* v. *Boone*, 759 F.2d 345, 348 (4th Cir.), cert. denied, 474 U.S. 861 (1985).

Contrary to petitioner's assertion (Pet. 46), the court of appeals did not find that the jury was actually coerced by the *Allen* charge in this case. The court of appeals' criticism of the charge in this case was based upon its discomfort with the *Allen* charge in general. Moreover, the court specifically rejected petitioner's contention that the resignation of the jury foreperson shortly after the *Allen* charge showed that the charge had a coercive effect.

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[4] Thus, petitioner's reliance (Pet. 43) on *Jenkins* v. *United States*, 380 U.S. 445 (1965), is misplaced. In that case, after the jury announced itself deadlocked, the trial judge told it, " 'You have got to reach a decision in this case.' " (380 U.S. at 446). This Court held that, in the circumstances of that case, that statement was unduly coercive. Here, by contrast, nothing in the court's instruction compelled the jury to reach a verdict.

The court stated instead that petitioner had shown only that the instruction caused one juror to change his mind. The fact that the jury deliberated for another one and one-half hours after receiving the *Allen* charge—even though the entire trial took only two days—suggests that the charge did not have the coercive effect that petitioner claims. See *United States* v. *Nichols,* 820 F.2d at 512 (one-hour period between charge and verdict not evidence of coercion); *United States* v. *Smith,* 635 F.2d 716, 721-722 (8th Cir. 1980) (45-minute period between charge and verdict not indicative of coercion); *United States* v. *Dawkins,* 562 F.2d 567, 570 (8th Cir. 1977) (same).

To be sure, some courts of appeals have exercised their supervisory powers to reject the traditional *Allen* charge in favor of other, milder formulations advising jurors of their duty to deliberate and to attempt to reach a verdict. See *United States* v. *Silvern, supra; United States* v. *Thomas; supra; United States* v. *Fioravanti, supra.* Other circuits, such as the court of appeals in this case, have approved variants on the original *Allen* charge. See *United States* v. *Boone,* 759 F.2d at 348 & n.2; *United States* v. *Anderton,* 679 F.2d 1199, 1203-1204 (5th Cir. 1982); *United States* v. *Angiulo,* 485 F.2d 37, 39-40 & n.3 (1st Cir. 1973); Federal Judicial Center, *Pattern Criminal Jury Instructions* 17 (1982); U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 168-169 (1978); U.S. Eleventh Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 262-263 (1985); see also *Winters* v. *United States,* 317 A.2d 530 (D.C. App. 1974) (en banc).[5] Each of these for-

[5] Still other circuits have not adopted or suggested particular pattern instructions, but evaluate *Allen* charges on a case-by-case basis to determine whether, under all the circumstances, the charge in a particular case was unfairly coercive. See, *e.g.*, *United States* v. *Blandin,*

mulations is designed to avoid some of the features of the *Allen* charge that have provoked criticism, while still maintaining the effectiveness of the charge by reminding the jurors that they have a duty to reach a verdict if they can do so in good conscience, even if they find the process to be a difficult one.

We submit that there is no compelling reason to have a uniform "duty to deliberate" instruction for all circuits, much less for all state courts. As long as the charge given by the trial court is effective without being unfairly coercive, the decision of different circuits to require the district courts under their supervision to use different language in their "duty to deliberate" charges is not one that requires this Court's intervention. There are a variety of formulations that can remind jurors of their duty to deliberate, while at the same time not unfairly coercing a verdict. Variety in the way that concept is conveyed—like variety in other jury instructions, such as the instructions on reasonable doubt—has been accepted practice in the federal system for years. See Federal Judicial Center, *Pattern Criminal Jury Instructions* 28-29 (1982). Unless and until this Court chooses in effect to promulgate pattern jury instructions for the district courts throughout the nation, some variation among instructions such as the "duty to deliberate" or "*Allen* charge" is inevitable.

Although we do not believe that the differing views among the circuits justify review in this case, there has been another recent development that may affect the disposition of this case. This Court recently granted review in *Lowenfield* v. *Phelps,* cert. granted, No. 86-6867 (June 22, 1987). One of the issues in that case is whether, during the sentencing phase in a capital case, the trial court erred by giving an *Allen* charge after several jurors announced

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784 F.2d 1048 (10th Cir. 1986); *United States* v. *Hollister,* 746 F.2d 420, 424-425 (8th Cir. 1984); *United States* v. *Armstrong,* 654 F.2d 1328, 1334 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982).

their view that further deliberations would not be helpful. To be sure, this case is distinguishable from *Lowenfield* on several grounds. First, this is not a capital case. Thus, the Eighth Amendment considerations that underlie the analysis of capital cases are not present in this case. Second, unlike in *Lowenfield,* the district court in this case did not inquire into the numerical division of the jury prior to giving the *Allen* charge to the jury. Compare *Brasfield* v. *United States,* 272 U.S. 448 (1926). Third, the *Allen* charge in *Lowenfield* was delivered during the penalty phase of the case, not during the guilt phase, and a failure on the jury's part to agree on a sentence in *Lowenfield* would not have required a retrial. Nonetheless, the petitioner in *Lowenfield* has made a broad attack on the *Allen* charge that would transcend the specific circumstances of that case. It is therefore possible that the Court's analysis in *Lowenfield* could affect the issues presented in this case and in all cases in which an *Allen* charge is given. For that reason, this Court may wish to hold this case until *Lowenfield* is decided, after which the Court can dispose of this case in light of the Court's decision there.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Lowenfield* v. *Phelps,* No. 86-6867, and disposed of in light of the decision in that case.

Respectfully submitted.

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